# Decisions of the United States Court of International Trade

Slip Op. 03-171

FORMER EMPLOYEES OF CHEVRON PRODUCTS COMPANY, PLAINTIFFS, v. UNITED STATES SECRETARY OF LABOR, DEFENDANT.

Court No. 00-08-00409

[Corrected Final Remand Determination, certifying Plaintiffs as eligible to apply for trade adjustment assistance benefits, is sustained.]

Decided: December 30, 2003

Meeks & Sheppard (Ralph H. Sheppard and Diane L. Weinberg), for Plaintiff.

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United States Department of Labor, Of Counsel; for Defendant.

# **OPINION**

RIDGWAY, Judge: Four long years ago, Plaintiffs ("the Workers")—then employed as "gaugers" —lost lost their jobs with the Roosevelt Terminal unit of Chevron Products Company ("CPDS"), due to increased imports of oil. Although the Workers timely applied to the U.S. Department of Labor ("Labor Department") for certain benefits, those benefits were denied.

 $<sup>^1</sup>$  As "gaugers" in the petroleum industry, the Workers here were basically responsible for "testing and determining the quality of crude oil to be purchased and transported." See Former Employees of Marathon Ashland Pipeline, LLC v. Chao, 26 CIT \_\_\_\_\_\_, 215 F. Supp. 2d 1345, 1347 (2002). Specifically, the Workers labored at "well head[s] and or crude oil tanks," performing various tasks to determine whether crude oil should be purchased—"[c]heck[ing] temperature, gaug[ing] the amount of crude in the tank, tak[ing] samples for gravity test and grind out for BS&W, and check[ing] the bottom of the tank for water or impurities." If the samples were satisfactory and all tests were passed, "a crude oil run ticket [was] written up" and "drivers were dispatched to the location . . . [to] load[] the crude oil on [their] truck[s] and transport[] it" to the refineries. Former Employees of Chevron Products Co. v. U.S. Sec'y of Labor, 26 CIT \_\_\_\_\_, \_\_\_\_ 245 F. Supp. 2d 1312, 1319 (2002) ("Chevron I") (citation omitted).

The Workers brought this action to contest the Labor Department's determinations denying their petition for transitional adjustment assistance benefits under the North American Free Trade Agreement ("NAFTA") Implementation Act, and denying them benefits as "secondarily-affected workers" under the Statement of Administrative Action accompanying the NAFTA Implementation Act. Complaint; 65 Fed. Reg. 30,442, 30,444 (May 11, 2000); 65 Fed. Reg. 46,988–89 (Aug. 1, 2000); AR 18–19, 32–38. However, as discussed in greater detail below, the NAFTA-TAA petition that is the predicate for this action was spawned by the Workers' earlier petition under the general trade adjustment assistance provisions of the Trade Act of 1974 (the "TAA" statute). And that petition, in turn, implicates another petition filed earlier, under the same statute, by a related group of workers. This action thus involves three separate, intertwined Labor Department investigations.

Jurisdiction lies under 19 U.S.C. § 2395(c) and 28 U.S.C. § 1581(d)(1) (1994).<sup>3</sup> Pending before the Court is the Labor Department's Notice of Revised Determination on Reopening (Corrected: September 25, 2003) ("Corrected Final Remand Determination"). *See* 68 Fed. Reg. 58,710 (Oct. 10, 2003). The Labor Department has now certified the Workers as eligible to apply for benefits—albeit almost four years after their initial application. Moreover, significantly, that certification is based *not* on any newly-discovered information but, instead, on the Labor Department's belated identification of an error that it committed *in February 2000* (when it denied the Workers' initial TAA petition).

Because it is a correction of the Labor Department's error in reviewing the Workers' TAA petition, the certification at bar is under the general TAA statute, rather than the NAFTA transitional adjustment assistance ("NAFTA-TAA") statute.<sup>4</sup> Specifically, the Labor Department has certified that:

<sup>&</sup>lt;sup>2</sup>Because this action was remanded to the agency, there are two separately-paginated administrative records—the initial Administrative Record, and the Supplemental Administrative Record (compiled in the course of the first remand). Further, because this action includes confidential information, there are two versions of each of those records. Citations to the public version of the Administrative Record are noted as "AR \_\_\_\_\_\_," while citations to the confidential version are noted as "CAR \_\_\_\_\_\_." There are no references herein to either the public version or the confidential version of the Supplemental Administrative Record. Moreover, because the Labor Department certified the Workers after the action was remanded for the second time, the agency did not further supplement the administrative record filed with the Court.

 $<sup>^3</sup>$ Except as otherwise expressly noted, statutory citations in this opinion are to the 1994 version of the U.S. Code. However, the pertinent text of the cited provisions remained the same at all times relevant herein.

 $<sup>^4</sup>$  Compare 19 U.S.C.  $\S~$  2271 et seq. with 19 U.S.C.  $\S~$  2331 .

All workers of Chevron Products Company, Roosevelt, Utah, who became totally or partially separated from employment on or after January 4, 1999, through two years from the date of certification, are eligible to apply for adjustment assistance under Section 223 of the Trade Act of 1974.

68 Fed. Reg. 58,710 (Oct. 10, 2003). The Workers have advised that they are satisfied with that certification. *See* Letter to Court from Counsel for Plaintiffs (Sept. 26, 2003). Accordingly, with the observations and clarifications that follow, the Labor Department's Corrected Final Remand Determination in this matter is sustained.

### I. Background

# A. The Trade Adjustment Assistance Laws

Chevron I included a brief overview of the United States' trade adjustment assistance laws, which are generally designed to address jobs lost due to increased international trade. See generally Chevron I, 26 CIT at \_\_\_\_, 245 F. Supp. 2d at 1317–18, and authorities cited there. Worker benefits available under the program established by the Trade Act of 1974 ("the TAA program")—including employment services, appropriate training, job search and relocation allowances, and income support payments—are denominated "trade adjustment assistance" ("TAA benefits"), while those available under the NAFTA Implementation Act, including the related Statement of Administrative Action ("the NAFTA-TAA program"), are referred to as "transitional adjustment assistance" ("NAFTA-TAA benefits"). Id. However, the two programs are very similar. For the sake of convenience, both are generally referred to herein as "trade adjustment assistance," except as otherwise specifically noted.

As *Chevron I* explained, the trade adjustment assistance laws are remedial legislation and, as such, are to be construed broadly to effectuate their intended purpose. *Chevron I*, 26 CIT at \_\_\_\_\_, 245 F. Supp. 2d at 1318 (citations omitted). Further, both "because of the *ex* 

<sup>&</sup>lt;sup>5</sup>The Government has confirmed that this certification covers not only gaugers, but all affected employees of Chevron Products Company (including truck drivers). *See* Transcript of Teleconference of Sept. 16, 2003 ("Tr.") at 25–27.

Similarly, the Government has confirmed that, as the phrase is used in the text of the certification in the Corrected Final Remand Determination, the "date of certification" is September 25, 2003. *See* Letter to Court from Counsel for Defendant (Oct. 1, 2003).

<sup>&</sup>lt;sup>6</sup> See generally Former Employees of Chevron Products Co. v. U.S. Sec'y of Labor, 27 CIT \_\_\_\_\_, \_\_\_\_\_n.2, 279 F. Supp. 2d 1342, 1344 n.2 (2003) ("Chevron II") (comparing TAA and NAFTA programs). See also Tr. at 27–28 (counsel for the Government explains that there is no significant difference in the benefits available under the TAA statute versus the NAFTA-TAA statute).

Congress recently consolidated the TAA and NAFTA-TAA programs into a new, expanded benefits program under the Trade Act of 2002. See Pub. L. No. 107–210, § 113, 116 Stat. 933, 937 (2002).

parte nature of the certification process, and the remedial purpose of [the statutes], the [Labor Department] is obliged to conduct [its] investigation with the utmost regard for the interests of the petitioning workers." Stidham v. U.S. Dep't of Labor, 11 CIT 548, 551, 669 F. Supp. 432, 435 (citing Abbott v. Donovan, 7 CIT 323, 327–28, 588 F. Supp. 1438, 1442 (1984) (quotations omitted) ).

Thus, while the Labor Department is vested with considerable discretion in the conduct of its investigation of trade adjustment assistance claims, "there exists a threshold requirement of reasonable inquiry." Former Employees of Hawkins Oil and Gas, Inc. v. U.S. Sec'y of Labor, 17 CIT 126, 130, 814 F. Supp. 1111, 1115 (1993). Courts have not hesitated to set aside agency determinations which are the product of perfunctory investigations. See generally Former Employees of Ameriphone, Inc. v. United States, 2003 Ct. Intl. Trade LEXIS 135, at \*5 (Oct. 24, 2003), 27 CIT \_\_\_\_, \_\_\_, F. Supp. 2d \_\_\_\_, \_\_\_ (2003), and cases cited there.

#### B. The History of This Case

As Chevron II noted, this case quickly took on a life of its own. By the time that opinion issued, remanding the action to the Labor Department yet again, the agency already had been accorded no fewer than seven "bites at the apple." Chevron II, 27 CIT at \_\_\_\_\_, 279 F. Supp. 2d at 1344–45.

As explained in *Chevron II*, the Labor Department's first two "bites" involved the agency's consideration of the Workers' initial petition for benefits under the TAA statute—the statute under which they have now been certified. 27 CIT at \_\_\_\_\_, 279 F. Supp. 2d at 1345–46. As set forth in section I.B.3 below, the Workers filed their petition for NAFTA-TAA benefits—the petition directly at issue in this action—only after their TAA petition was denied. See generally *Chevron II*, 27 CIT at \_\_\_\_\_, 279 F. Supp. 2d at 1346.

# 1. The TAA Petition

Following their termination by CPDS on October 31, 1999, the Workers promptly filed a TAA petition with the Labor Department. AR 4. Just a few weeks later, on November 24, 1999, the agency notified them that, in fact, they were already eligible for TAA benefits, under petition TA-W-36,295 filed previously by former employees of another Chevron entity-Chevron USA Production Company ("CPDN")—which had been granted in July 1999. See AR 4, 5; 64 Fed. Reg. 43,722, 43,724 (Aug. 11, 1999); see also 64 Fed. Reg. 61,940 (Nov. 15, 1999).

However, when officials at the Utah Department of Workforce Services began to make plans to proceed with training for the Workers, they discovered that the men's names did not appear on the list of those eligible for benefits. See AR 4. Upon further inquiry, CPDN

representatives told the state officials that—as former employees of CPDS—the Workers here "should not be covered under the [pre-existing CPDN] certification." AR 5; see also Memo to U.S. Department of Labor Office of Trade Adjustment Assistance from State of Utah Department of Workforce Services, re: NAFTA-TAA Petition Preliminary State Investigation (April 6, 2000) (referring to "attached letter dated January 4, 2000, in which Ms. Alice Edman, TRA Coordinator explains that the Trade Act Petition for Chevron U.S.A. Production Company (CPDN), #TA-W 36,295 (I-Utah) does not cover the worker[s] from CPDS").

#### 2. The Resubmitted TAA Petition

Utah state officials resubmitted the Workers' original TAA petition to the Labor Department in early January 2000, noting CPDN's claim that the Workers here were not covered by the pre-existing CPDN certification, and requesting that the Labor Department "confirm" the scope of that certification. The state officials further requested that—if the Labor Department concluded that the Workers in fact were not covered by the pre-existing certification—the agency consider the Workers' TAA petition "either as a new petition or . . . as an amendment to the . . . [pre-existing] certification." See AR 5.

Despite the State's express request, the Labor Department failed to review the scope of the CPDN certification, to confirm whether or not the Workers were covered by it. *See* Tr. at 12–13. Instead, the agency proceeded to initiate a new TAA investigation, designated TA–W–37,240. As discussed in *Chevron II*, that investigation consisted largely of sending the three-page standard form TAA "Business Confidential Data Request" questionnaire to CPDS, the Workers' former employer. Based solely on CPDS's responses to the questionnaire, the Labor Department denied the Workers' TAA petition on the ground that their work did not constitute "production" under the statute. *See Chevron II*, 27 CIT at \_\_\_\_\_, 279 F. Supp. 2d at 1345–46; 65 Fed. Reg. 14,626 (March 17, 2000); AR 16–17.

#### 3. The NAFTA-TAA Petition

While assisting the Workers with their appeal of the Labor Department's denial of the TAA petition, the Utah state officials learned for the first time "that Chevron had been buying Canadian oil." AR 4. In light of the Canadian imports, a new petition was filed—this time seeking NAFTA-TAA benefits. AR 1-5.

However, with no further investigation whatsoever, relying exclusively on its file on the TAA petition, the Labor Department denied the Workers' NAFTA-TAA petition, which had been designated

 $<sup>^7{\</sup>rm The}$  Workers subsequently sought administrative reconsideration of the denial of their TAA petition. That request, too, was denied. See 65 Fed. Reg. 19,387 (April 11, 2000).

NAFTA-3854. *Chevron II*, 27 CIT at \_\_\_\_\_, 279 F. Supp. 2d at 1346-47; 65 Fed. Reg. 30,442, 30,444 (May 11, 2000); AR 18–19, 24–28. It is that denial of the Workers' NAFTA-TAA petition which directly gave rise to this action.

#### 4. Subsequent Proceedings

*Chevron II* chronicles the proceedings that followed. The Labor Department's additional five "bites at the apple" included the Workers' application for administrative reconsideration of their NAFTA-TAA petition, which the agency denied; the filing of this action and the extensions of time which the agency was granted to, inter alia, decide whether to request a voluntary remand or reach some kind of settlement (neither of which materialized); the issuance of *Chevron* I, a fairly scathing critique of the Labor Department's investigation and analyses to that point, culminating in a remand to the agency with specific instructions for further investigation and analysis; the extension of time granted to the Government for "additional investigation" prior to the filing of the remand results (an extension which, under the circumstances, amounted to a *de facto* voluntary remand); and, ultimately, the Labor Department's negative determination on remand, reaffirming the agency's determination that the Workers failed to qualify for benefits. See generally Chevron II, 27 CIT at \_\_\_\_, 279 F. Supp. 2d at 1347-49.

# 5. Chevron II, the Second Remand, and the Eventual Certification

Based on the administrative record as it then existed, and relying heavily on a recent decision in another trade adjustment assistance case involving gaugers, Chevron II rejected the Labor Department's determination on remand and concluded that the Workers here in fact were engaged in "production." 27 CIT at \_\_\_\_\_, 279 F. Supp. 2d at 1353-55 (citing Marathon Ashland, 27 CIT \_\_\_\_, 277 F. Supp. 2d 1298 (2003) ). Chevron II nevertheless gave the Labor Department one final "bite at the apple," ordering a second remand and instructing the agency to further investigate and make a determination as to whether imports of crude oil contributed importantly to the Workers' termination and, if so, "under which statute [TAA or NAFTA-TAA] certification would be warranted" (i.e., whether the relevant imports were from NAFTA countries, or elsewhere in the world), and reserving judgment on the Workers' alternative claims to benefits as "support service workers" and as "secondarily-affected workers." The results of that second remand were to be filed with the Court no later than September 2, 2003. 27 CIT at \_\_\_\_\_, 279 F. Supp. 2d at 1356-57.

Under cover of a letter dated September 3, 2003, the Labor Department submitted its "Notice of Revised Determination on Reopening," which referenced the docket number of the Workers' TAA petition (TA-W-37,240)—rather than the docket number of their NAFTA-TAA petition (NAFTA-3854)—and certified the Workers as eligible to apply for TAA benefits (rather than NAFTA-TAA benefits) based on the agency's determination that the Workers are (were) indeed covered by the pre-existing CPDN certification, issued in July 1999. *See* Notice of Revised Determination on Reopening (Sept. 2, 2003); 68 Fed. Reg. 54,491 (Sept. 17, 2003). *See also* 68 Fed. Reg. 58,710 (Oct. 10, 2003).

Although the September 2, 2003 notice accurately stated that *Chevron II* ordered the Labor Department to investigate, on remand, "whether the workers lost their jobs because of increased imports," the notice gave no indication that the agency in fact had further investigated that issue. Even more perplexing, the notice indicated that the agency's investigation on remand had included "additional investigation about whether [the Workers here] were production workers"—an issue which had already been definitively resolved in *Chevron II* and thus had not been remanded to the agency. Most importantly, the notice offered no explanation for the timing or rationale of the Labor Department's "about-face" on the coverage of the Workers here under the July 1999 CPDN certification. *See* Notice of Revised Determination on Reopening (Sept. 2, 2003). *See also* 68 Fed. Reg. 58,710 (Oct. 10, 2003).

A September 9, 2003 letter to the parties sought clarification of these and other matters, which were the subject of a subsequent teleconference. *See* Letter to Counsel from Court (Sept. 9, 2003); Transcript of Teleconference of Sept. 16, 2003. Following that teleconference and further internal consultation and review, the Labor Department issued the Corrected Final Remand Determination, reflecting various clarifications of and corrections to its September 2, 2003 notice. <sup>10</sup> *See* 68 Fed. Reg. 58,710 (Oct. 10, 2003). As that notice

<sup>&</sup>lt;sup>8</sup>The September 17, 2003 Federal Register notice inadvertently omitted in its entirety the text of page two of the four-page Notice of Revised Determination on Reopening, dated September 2, 2003. *Compare* Notice of Revised Determination on Reopening (Sept. 2, 2003) *with* 68 Fed. Reg. 54,491 (Sept. 17, 2003).

<sup>&</sup>lt;sup>9</sup>Similarly, the notice stated that *Chevron II* ordered the Labor Department to consider, on remand, whether the Workers qualified for benefits as secondarily-affected workers. *See* Notice of Revised Determination on Reopening (Sept. 2, 2003); *see also* 68 Fed. Reg. 58,710 (Oct. 10, 2003). But, in fact, *Chevron II* never reached that issue.

 $<sup>^{10}</sup>$ The Corrected Final Remand Determination revises the September 2, 2003 notice in two substantive respects.

First, the Corrected Final Remand Determination clarifies the relationships among the various related corporate entities. Specifically, the September 2, 2003 notice indicated that "Chevron Products Company, Roosevelt, Utah is a wholly owned subsidiary of Chevron USA Production Company" and that the Labor Department therefore considered that "the workers' firm [was] actually Chevron USA Production Company." See Notice of Revised Determination on Reopening (Sept. 2, 2003). The Corrected Final Remand Determination replaced that quoted text with the statement that "Chevron Products Company, Roosevelt, Utah is affiliated with Chevron USA Production Company (as both are wholly owned subsidiaries of Chevron USA, Inc.)." See Tr. at 4–5; 68 Fed. Reg. 58,710 (Oct. 10, 2003). The Corrected Final Remand Determination thus makes it clear that Chevron Products Company in fact is

explains, the Labor Department's certification of the Workers here is predicated on the relationship between CPDS and CPDN, and on the fact of CPDN's pre-existing certification:

Because Chevron Products Company... is affiliated with Chevron USA Production Company (as both are wholly owned subsidiaries of Chevron USA, Inc.) . . . [,] the two firms [Chevron Products Company (CPDS) and Chevron USA Production Company (CPDN)] constituted an integrated production process, the final products of which are crude oil and natural gas.

The [Labor] Department, on July 6, 1999, issued a certification of eligibility for workers of Chevron USA Production Company in Utah, to apply for trade adjustment assistance (TA-W-36,295). That certification was supported by increased imports of crude oil in January-March 1999 compared to the same time period of 1998. Therefore, the Department certifies the Chevron Products, Roosevelt, Utah, workers as eligible for assistance under TAA.

Id.

not a wholly owned subsidiary of Chevron USA Production Company. Instead, both Chevron Products Company and Chevron USA Production Company are wholly owned subsidiaries

(It is worth noting that, in two separate places, the Corrected Final Remand Determination characterizes Chevron Products Company and Chevron USA Production Company as "affiliates" of one another. But, in a third place, that same determination states the Labor Department's finding that "Chevron Products is an appropriate subdivision of Chevron USA." 68 Fed. Reg. 58, 710 (Oct. 10, 2003) (emphasis added). It is not entirely clear, in this last context, whether the Labor Department's reference to "Chevron USA" is shorthand for "Chevron USA Production Company" (CPDS's "sister" subsidiary) or for "Chevron USA, Inc." (CPDS's parent company). See Tr. at 8-9. It is thus not clear whether the Labor Department is here treating one subsidiary as an "appropriate subdivision" of the other for purposes of the agency's analyses.)

The second substantive difference between the September 2, 2003 notice and the Corrected Final Remand Determination concerns the rationale underlying the Labor Department's assertion that the characterization of the Workers here as "production workers" or "service workers" was mooted by the agency's determination that they are eligible for benefits under the pre-existing July 1999 certification. Specifically, the September 2, 2003 notice asserted that, "[s]ince the workers were a part of a firm which produces an article, crude oil, . . . the characterization of the workers as production or service workers becomes irrelevant because that distinction only arises in cases where the workers are employed by separate firms." Notice of Revised Determination on Reopening (Sept. 2, 2003) (emphasis added). In the Corrected Final Remand Determination, that statement is further qualified by the addition of the phrase "or there are subdivisions within the firm that produce articles that are separately identifiable" at the end of the sentence. 68 Fed. Reg. 58,710 (Oct. 10, 2003). See also Letter to Counsel from Court (Sept. 9, 2003) at ¶5; Tr. at 23-25. The Corrected Final Remand Determination thus refined the September 2, 2003 notice, to more accurately state existing law by reflecting Abbott v. Donovan, 6 CIT 92, 570 F. Supp. 41 (1983) and its progeny.

#### II. Analysis

While the Workers here are no doubt gratified that they have at long last prevailed on their claim for benefits, they are also—quite understandably—frustrated that it has taken the Labor Department nearly four years to grant them the relief to which they are entitled. *See* Tr. at 3–4.

As *Chevron I* noted, "[w]here, as here, 'the company under investigation is part of a larger corporate entity,' " *Linden Apparel* imposes upon the Labor Department "'a duty of providing a description of the [company's] organizational structure and of inquiring into how the subject company fits into the organization.' " *Chevron I*, 26 CIT at \_\_\_\_\_ n.14, 245 F. Supp. 2d at 1328 n.14 (*quoting Former Employees of Linden Apparel Corp. v. United States*, 13 CIT 467, 470, 715 F. Supp. 378, 381 (1989) ). <sup>11</sup> The record in this action evidences the Labor Department's abject failure to fulfill that obligation.

The record reveals that, over the course of the years that have passed since the Workers' termination by CPDS, the Labor Department has been repeatedly reminded of the existence of entities related to CPDS (including CPDN and Chevron USA, Inc.); the Labor Department has been repeatedly reminded of both (a) the TAA petition filed by the Workers at issue here, and (b) the Labor Department's pre-existing certification of the workers at CPDN; and the Labor Department has been repeatedly reminded of its obligations under *Linden Apparel* to investigate the structure and interrelationships of the various Chevron entities and, moreover, has been explicitly instructed to consider the agency's findings and determinations in TAA and NAFTA-TAA investigations concerning other related Chevron entities.

Indeed, it was the Labor Department itself that first made the connection between the pre-existing certification of the CPDN workers and the Workers at issue here. As discussed above, the Labor Department initially advised the Workers here that they were covered by the CPDN certification in late November 1999, when the Workers had been out of work for less than one month. See AR 5 (noting that, on November 24, 1999, the Labor Department advised the Workers that they were covered by the CPDN certification). And the Government concedes that, as a result of the January 4, 2000 letter to the Labor Department from Utah state officials (which, inter alia, requested that the agency "confirm" the scope of the pre-existing CPDN certification vis-a-vis the Workers here), the Labor Department was on notice of the relationships among CPDS, CPDN and

 $<sup>^{11}</sup>$  Accord Former Employees of Carhartt, Inc. v. Chao, 2001 Ct. Intl. Trade LEXIS 77, at \*18 (June 13, 2001), 25 CIT \_\_\_\_, \_\_\_\_ n.8, \_\_\_\_ F. Supp. 2d \_\_\_\_, \_\_\_\_ n.8 (2001) (quoting Linden Apparel); Former Employees of Champion Aviation Prods. v. Herman, 1999 Ct. Intl. Trade LEXIS 44, at \*\*13 (June 4, 1999), 23 CIT 349, 353 (same).

Chevron USA, Inc. at least as of that date. See Tr. at 6; AR 5 (Utah state officials' letter of January 4, 2000 to Labor Department, referring to CPDN as "A Division of Chevron U.S.A., Inc." and to CPDS as "a separate entity of Chevron U.S.A., Inc."). 12

Notwithstanding the state officials' express request and the Labor Department's independent obligation under *Linden Apparel* to investigate the structure and organization of interrelated corporate entities, and notwithstanding the information provided to the agency concerning the relationship between CPDN and CPDS, it appears that the Labor Department simply "dropped the ball," abandoning with no further review—its November 1999 determination that the Workers here were covered by the pre-existing CPDN certification. Tr. at 13, 18–19. In any event, neither the Labor Department's denial of the Workers' resubmitted TAA petition nor the agency's determination declining reconsideration of that denial made any reference to the relationship between CPDS and CPDN, or to the preexisting CPDN certification. AR 16-17; 65 Fed. Reg. 19,387 (April 11. 2000).<sup>13</sup>

A few months later, the Workers once again alerted the Labor Department to the pre-existing CPDN certification, and to the relationship between CPDS and CPDN. In late May 2000, the Workers sought administrative reconsideration of their petitions for TAA and NAFTA-TAA, specifically citing the pre-existing CPDN certification ("TA-W 36, 295 (I-Utah)"). See AR 29-30; AR 32 (noting that Workers' undated request for reconsideration was transmitted on May 25, 2000). The Labor Department's subsequent determination denying reconsideration expressly acknowledged the CPDN certification. But the agency apparently gave it short shrift, and failed to consider any implications of that certification for the Workers here. Yet again, the Labor Department simply failed to "put two and two together." See AR 32; 65 Fed. Reg. 46,988 (Aug. 1, 2000) ("With respect to TA-W-36,295I, the petition is a certification issued on July 6, 1999, applicable to workers of Chevron Production, Chevron USA, Inc., all locations in Utah. Since the petitioners in this case [the Workers at issue here] are not employees of that company [CPDN], there is no basis to reexamine the findings of that investigation.").

<sup>&</sup>lt;sup>12</sup>In the course of the Labor Department's investigation of the Workers' resubmitted TAA petition, a representative of CPDS advised the Labor Department, in no uncertain terms, that CPDS was "a division of Chevron U.S.A. Inc." CAR 13.

<sup>&</sup>lt;sup>13</sup>It is not possible to reconstruct with precision the entire chain of events surrounding the Labor Department's handling of the Workers' TAA petition, because-although the agency ultimately certified the Workers under that petition (rather than their NAFTA-TAA petition)—the administrative record of the TAA investigation was never filed in this action. It is therefore impossible to tell from this record whether, for example, the Workers' TAA petition, or their request for reconsideration of the denial of that petition, made any reference to the relationship between CPDN and CPDS, or to the pre-existing CPDN certifica-

Documents appended to the Workers' Complaint filed in this action again should have alerted the Labor Department to both the pre-existing certification of CPDN, and the relationship between CPDN and CPDS as "sister" subsidiaries of Chevron USA, Inc. One attachment was a chronology of events in the administrative proceedings, which noted that—in late November 1999—the Workers here had "received notice back from DOL [the Labor Department] that they were covered under *petition TA-W-36,295* [the pre-existing CPDN certification]," but that it was later discovered that CPDN was "a different subsidiary" than CPDS. See Memo to Barbara Vail from Tracy Parrish (July 12, 2000) (emphasis added) (appended to Complaint). A second attachment—the State of Utah's Findings and Recommendations on the Workers' NAFTA-TAA petition—similarly noted the fact of the pre-existing CPDN certification, and set forth the State's finding that "[t]he Chevron Oil company has several subsidiary units that have been impacted [by imports of oil] as evidenced by approved petition #TA-W 36,295 (I-Utah) for Chevron U.S.A. Production Company (CPDN)." See Memo to Labor Department from Utah Department of Workforce Services re: NAFTA-TAA Petition Preliminary State Investigation (April 6, 2000) (emphasis added) (appended to Complaint).

The Workers even included as Exhibit 1 to their opening brief in this action an actual copy of the Labor Department's pre-existing certification of CPDN. *See* Memorandum in Support of Plaintiffs' Motion for Judgment on the Agency Record ("Pls.' Initial Brief"), Exh. 1 (64 Fed. Reg. 61,940–41 (Nov. 15, 1999), in TA–W–36,295). That same brief, filed in June 2001, summarized the history of the case, and—in the space of a single page—highlighted the Labor Department's initial notification to the Workers of their coverage under the pre-existing CPDN certification, and also noted that both CPDN and CPDS were "related" divisions of the same parent company—Chevron USA, Inc. *See* Pls.' Initial Brief at 5.<sup>14</sup> Elsewhere, the brief asserted that the Labor Department's failure to certify the Workers here was "grossly inconsistent with DOL's prior decisions regarding Chevron U.S.A. workers," citing as one example the pre-existing CPDN certification. *See* Pls.' Initial Brief at 7.

Still the Labor Department failed to "connect the dots." Indeed, incredibly, the Government's response brief summarily dismissed Plaintiffs' Exhibit 1—the copy of the pre-existing CPDN certification—as "inapposite," and urged that it be stricken from the record. See Defendant's Response in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record at 18–19, 21–22.

<sup>&</sup>lt;sup>14</sup>Statements in the Workers' initial reply brief were to the same effect. See Plaintiffs' Reply to Defendant's Response in Opposition to Plaintiffs' Motion for Judgment on the Agency Record at 2 (reiterating that the plaintiff Workers "are former employees of [CPDS], which is a subsidiary of Chevron U.S.A., Inc.").

The Government now candidly concedes that the Labor Department was on notice of the relationships among CPDS, CPDN and Chevron USA, Inc. at least as early as January 2000, but simply failed to "appreciate the shared parentage" of CPDS and CPDN until the Court's most recent remand, in *Chevron II*. Tr. at 6. While the Government's candor is to be commended, the Labor Department's claims of ignorance are difficult to accept.

Even if the Labor Department in fact somehow managed to overlook the multiple references to its pre-existing certification of CPDN and to the relationships among CPDS, CPDN and Chevron USA, Inc. throughout the course of the administrative proceedings (as summarized above), the agency's mandate in response to the remand in Chevron I could hardly have been more pointed. See generally Chevron I, 26 CIT \_\_\_\_\_, 245 F. Supp. 2d 1312. Referring generally to the pre-existing CPDN certification (26 CIT at \_\_\_\_ n.5, 245 F. Supp. 2d at 1320 n.5), noting that the plaintiff Workers' former employer— CPDS—"is a subsidiary of Chevron U.S.A., Inc." (26 CIT at \_ 245 F. Supp. 2d at 1326 n.10), and emphasizing the Labor Department's affirmative obligation under *Linden Apparel* to investigate the interrelationships among relevant corporate entities (26 CIT \_ n.14, 245 F. Supp. 2d at 1328 n.14), *Chevron I* remanded this action to the Labor Department with instructions to "conduct a thorough investigation of the duties of the [Workers], in the context of the oil production scheme of CPDS-related entities." 26 CIT at \_\_\_ F. Supp. 2d at 1328 (emphasis added). Elsewhere, *Chevron I* emphasized the Labor Department's need to consider "the organizational structure of CPDS and related corporate entities." 26 CIT \_ n.16, 245 F. Supp. 2d at 1329 n.16. And, discussing the potential significance of the pre-existing CPDN certification, *Chevron I* expressly directed that—on remand—the Labor Department consider "the findings and determinations of the Labor Department in any relevant [TAA or NAFTA-TAA] investigations concerning other related Chevron entities." 26 CIT at \_\_\_\_ n.23, 245 F. Supp. 2d at 1333 n.23 (emphasis added). In light of all these circumstances, the Labor Department's claimed ignorance of the relationship between CPDN and CPDS, and of the significance of the pre-existing CPDN certification, simply strains credulity.

In sum, the record in this action evidences not only the Labor Department's dereliction of duty under Linden Apparel, but—even more fundamentally—its failure to fulfill its overarching obligations to "marshal all relevant facts to make a determination" in trade adjustment assistance cases, and to "conduct [its] investigation with the utmost regard for the interests of the petitioning workers." 29 C.F.R. § 90.12 (1999); Stidham, 11 CIT at 551, 669 F. Supp. at 435 (citation omitted).

In a word, this case stands as a monument to the flaws and dysfunctions in the Labor Department's administration of the nation's trade adjustment assistance laws—for, while it may be an extreme case, it is regrettably not an isolated one. The relatively high number of requests for voluntary remands in trade adjustment assistance cases appealed to this Court speaks volumes about the calibre of the Labor Department's investigations in general, and the Government's ability to defend them. See generally Ameriphone, 2003 Ct. Intl. Trade LEXIS 135, at \*15–\*17, 27 CIT at \_\_\_\_\_, \_\_\_\_ F. Supp. 2d at \_\_\_\_\_\_. Similarly telling is the growing line of precedent involving court-ordered certifications of workers, evidencing the bench's mounting frustration with the Labor Department's handling of these cases. <sup>15</sup> Clearly, there is a message here. Only time will tell whether the Labor Department, and Congress, are listening.

Much ink has been spilt on this case over the past four years. Needless to say, a proper and thorough initial investigation would have spared all parties—including the Labor Department, as well as the Justice Department, the Workers, their counsel, and the Court—untold hours of work. But, most significantly, the acts and omissions of the Labor Department deprived the Workers of the timely relief to which they were entitled.

This is not a case of "better late than never." The record here—perhaps mercifully—does not reveal the current employment status of these Workers, or how (and with what success) the men have endeavored to support themselves and their families in the years since their termination by CPDS. But, as a general principle, the effectiveness of trade adjustment assistance depends upon its timeliness; and the effectiveness cannot be measured in dollars alone.

See also Former Employees of Tyco Elecs. v. U.S. Dep't of Labor, 27 CIT \_\_\_\_\_\_, \_\_\_\_\_, 264 F. Supp. 2d 1322, 1329–30 (2003) (discussing additional cases in which court's frustration with the Labor Department's unwillingness or inability to comply with remand orders resulted in court-ordered certifications); Tyco Elecs., 27 CIT \_\_\_\_\_\_, \_\_\_\_\_, 259 F. Supp. 2d 1246, 1248 (2003) (although remand results were required to be filed on October 7, 2002, the Labor Department still had not even begun the remand investigation more than a month after that date).

<sup>15</sup> See, e.g., Former Employees of Pittsburgh Logistics Systems, Inc. v. U.S. Sec'y of Labor, 2003 Ct. Intl. Trade LEXIS 111, \*17, \*45 (Aug. 28, 2003), 27 CIT \_\_\_\_\_, \_\_\_\_ (concluding that, after "five bites at the apple," "further remand [to the Labor Department] would be futile," and ordering the agency to certify the workers for trade adjustment assistance); Marathon Ashland, 27 CIT at \_\_\_\_\_, 277 F. Supp. 2d at 1312–13 (mandating that the Labor Department certify workers for trade adjustment assistance, observing that "[the Department of] Labor's and the company's inability or unwillingness to answer with any specificity the questions necessary... to evaluate the legitimacy of Plaintiffs' claim place the court in a difficult position," and concluding that "[n]othing in the record indicates that [the Department of] Labor has the resources or willingness to conduct an investigation beyond making inquiries of [the company]"), appeal docketed, No. 03–1556 (Fed. Cir. Aug. 18, 2003); Former Employees of Barry Callebaut v. Herman, 26 CIT \_\_\_\_, 240 F. Supp. 2d 1214, 1227–28 (2002) (instructing the Labor Department to certify workers for TAA and NAFTA-TAA benefits, holding that "[the Department of] Labor's inadequate efforts have failed to produce a determination that meets minimum legal standards. Having failed to conduct an adequate investigation after four opportunities, [the Department of] Labor will not receive another."), appeal docketed, No. 03–1113 (Fed. Cir. Nov. 27, 2002).

There is a very human face on these cases. Workers who are entitled to trade adjustment assistance benefits but fail to receive them may lose months, or even years, of their lives. 16 And the devastating personal toll of unemployment is well-documented. Anxiety and depression may set in, with the loss of self-esteem, and the stress and strain of financial pressures. Some may seek refuge in drugs or alcohol; and domestic violence is, unfortunately, all too common. The health of family members is compromised with the cancellation of health insurance; prescriptions go unfilled, and medical and dental tests and treatments must be deferred (sometimes with life-altering consequences). And college funds are drained, then homes are lost, as mortgages go unpaid. Often, marriages founder.

As explained in *Int'l Union v. Marshall*, the enactment of the trade adjustment assistance provisions of the Trade Act of 1974 reflected Congress' recognition "that fairness demanded some mechanism whereby the national public, which realizes an overall gain through trade readjustments, can compensate the particular . . . workers who suffer a loss much as the doctrine of eminent domain requires compensation when private property is taken for public use. Otherwise the costs of a federal policy [of free trade] that conferred benefits on the nation as a whole would be imposed on a minority of American workers...." Int'l Union v. Marshall, 584 F.2d 390, 395 (D.C. Cir. 1978) (citations omitted).<sup>17</sup>

Those same concerns are at least as real today as they were 25 years ago. Making the case for trade adjustment assistance, one leading senator recently noted:

No nation is better suited or better prepared to benefit from global trade [than the United States]. We have the besteducated workers and most productive workforce in the world, the most mature economy, the most developed infrastructure. We are in a position to seize the high-skill, high-wage jobs generated by open global markets, so long as we don't turn our backs on them.

Just as we can't turn our backs on trade, we can't turn our backs on the hard-working American families who have had their lives ruined by the impersonal forces of trade.

It can be devastating to a family when a parent loses his or her job because a factory closes down or moves away. That devasta-

<sup>&</sup>lt;sup>16</sup> As Marathon Ashland put it, "TAA cases are different from most litigation before this court. This is not a situation, such as in customs or antidumping duty cases, where a bond can be posted to cover anticipated cost and reduce liability." 27 CIT at \_\_\_\_\_, 277 F. Supp.

<sup>&</sup>lt;sup>17</sup>The same concerns drove enactment of the transitional adjustment assistance provisions of the NAFTA Implementation Act. See generally Chevron I, 26 CIT at \_ Supp. 2d at 1317-18 (summarizing history, purpose and intent of NAFTA-TAA program).

tion can turn to real fear if losing that job means losing health insurance.

The reality is that the jobs we gain from trade do nothing to compensate the men and women who have lost their jobs because of trade.

148 Cong. Rec. S7,828 (daily ed. Aug. 1, 2002) (statement of Sen. Daschle).

And the Administration, too, has pledged its renewed "commit-[ment] to assisting workers whose jobs are threatened by or lost to international competition[, to] acquire the skills necessary to compete in the new economy." White House Fact Sheet, "What is Trade Adjustment Assistance?", available at http://www.whitehouse.gov/ infocus/internationaltrade/taapager.html.

Trade adjustment assistance programs thus historically have been, and today continue to be, touted as the *quid pro quo* for policies of free trade. But Congress and the Labor Department break faith with American workers if trade adjustment assistance programs are not adequately funded and conscientiously administered. As the Chairman of the Senate Finance Committee has sagely cautioned, "[A]n honest, responsible program to address the needs of workers . . . who lose their jobs because of trade is perhaps the most important element of a politically viable program to expand trade. If it is ignored, efforts at trade liberalization will ultimately fail." Sen. Max Baucus, Chairman, Senate Finance Committee, Keynote Address, "Trade Policy in 2002," Institute for International Economics, Washington, D.C. (Feb. 26, 2002).

#### III. Conclusion

Whether as a result of overwork, incompetence, or indifference (or some combination of the three), the Labor Department—for almost four years—deprived the Workers here of the job training and other benefits to which they are entitled. Now, finally, the agency has certified them as eligible to apply for trade adjustment assistance; and the Workers have advised that they are satisfied with that certifica-

<sup>&</sup>lt;sup>18</sup> In light of the current state of the economy, the Labor Department is likely inundated with trade adjustment assistance claims. But, as *Ameriphone* noted:

<sup>[</sup>I]f the agency's resources are not adequate to enable it to meet its statutory mandate, the remedy lies with Congress. The volume of claims filed with the agency cannot serve to excuse it from fulfilling its legal obligations *vis-a-vis* the legions of displaced workers. Indeed, if anything, the volume of claims filed serves to underscore the vital nature of the agency's mission.

tion. The Corrected Final Remand Determination in this matter is therefore sustained. See 68 Fed. Reg. 58,710 (Oct. 10, 2003). Judgment will enter accordingly.

#### SLIP. OP. 04-2

FORMER EMPLOYEES OF MERRILL, CORPORATION PLAINTIFF, v. UNITED STATES SECRETARY OF LABOR, DEFENDANT.

Court No. 03-00662

#### **ORDER**

CARMAN, Judge: Upon consideration of defendant's consent motion for voluntary remand, it is hereby

ORDERED that defendant's motion is granted; and it is further ORDERED that this action is remanded to the Department of Labor to conduct a further investigation and to make a determination as to whether the former employees of Merrill Corporation are eligible for certification for worker adjustment assistance benefits; and it is further

ORDERED that the remand results shall be filed no later than 90 days after the date of this order; and it is further

ORDERED that plaintiff shall file papers with the Court indicating whether it is satisfied or dissatisfied with the remand results no later than 30 days after the remand results are filed with the Court; and it is further

ORDERED that the defendant will file an answer within 30 days after plaintiff responds to the Department of Labor's remand results.

# Slip Op. 04-3

SAAB CARS USA, INC., PLAINTIFF, v. UNITED STATES, DEFENDANT.

#### **PUBLIC VERSION**

Court No. 00-00041

[Judgment in part for Plaintiff.]

Date: January 6, 2004

Gibson, Dunn & Crutcher LLP (Judith A. Lee and Brian J. Rohal) for Plaintiff Saab Cars USA, Inc.

Peter D. Keisler, Assistant Attorney General, and Barbara S. Williams, Acting Attorney in Charge, Civil Division, Commercial Litigation Branch, United States Department of Justice; Paula Smith, Office of Assistant Chief Counsel, International Trade Litigation, United States Bureau of Customs and Border Protection, Of Counsel, for Defendant United States.

#### **OPINION**

GOLDBERG, Senior Judge: Saab Cars USA, Inc. ("SCUSA") imports into the United States automobiles from Swedish manufacturer Saab Automobile AB ("Saab Auto"). SCUSA protested the United States Customs Service's ("Customs") liquidation of several entries of automobiles that were appraised at transaction value. In the protests, SCUSA argued that an allowance in value should be granted for defects present in the automobiles at the time of importation. Customs denied SCUSA's protests.

SCUSA timely appealed Customs's denial of those protests to the Court of International Trade on January 20, 2000. On March 6, 2001, SCUSA filed a motion for summary judgment requesting a partial refund of duties for the defective automobiles. Customs filed a cross-motion for summary judgment on June 4, 2001, requesting that the Court dismiss this action. Both parties' motions for summary judgment were denied by the Court on July 14, 2003. In its opinion, the Court disposed of the repairs covered by some protests on jurisdictional grounds, holding that "the Court does not have jurisdiction over the automobiles that were repaired after the date SCUSA filed its protests with Customs." Saab Cars USA, Inc. v. United States, 27 CIT \_\_\_\_\_, Slip Op. 03–82 at 14 (July 14, 2003). With regard to the remaining repairs, the Court instructed SCUSA that "[w]hat remains for trial is to develop the factual record to 'inde-

<sup>&</sup>lt;sup>1</sup>The United States Customs Service has since become the Bureau of Customs and Border Protection per the Homeland Security Act of 2002, § 1502, Pub. L. No. 107–296, 116 Stat. 2135, 2308–09 (Nov. 25, 2002), and the Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. 108–32, p. 4 (Feb. 4, 2003).

pendently confirm the validity' of the repair records in order to establish that the defects did indeed exist at the time of importation." Id. at 23 (citation omitted).

The parties agreed, in lieu of trial, to submit a factual stipulation to the Court due September 29, 2003. A hearing on the matter was held on October 1, 2003, at which both parties presented their respective arguments before the Court. For the following reasons, the Court holds that SCUSA is entitled to an allowance for its port repair expenses and rejects all other claims presented by SCUSA.

#### I. BACKGROUND

SCUSA imports into the United States automobiles manufactured by Saab Auto. The automobiles purchased by SCUSA from Saab Auto are subject to a warranty agreement (the "Warranty"). The terms of the Warranty are contained in the Warranty Policy and Procedures Manual dated January 11, 1995, and updated by warranty policy letters. According to SCUSA, the terms of the Warranty reimburse SCUSA for the following specific repair expenses: (1) prewarranty, (2) new car warranty, (3) emission warranty, (4) perforation warranty, and (5) the importer's own extended warranty. Warranty Manual, Pl.'s Ex. 1 (Confidential) ¶4.2.1.

To claim reimbursement from Saab Auto under the terms of the Warranty, the retailer must submit the repairs to SCUSA's AS-400 Warranty System. The AS-400 Warranty System is a database system designed for SCUSA to track the automobile repairs which correspond to each Vehicle Identification Number ("VIN"). The AS-400 Warranty System also runs a series of "edits" to confirm that the repair was subject to the Warranty. In addition, Saab Auto requires SCUSA (along with other importers) to audit dealers' warranty repair claims. Id. ¶5.4.6.

At issue in this case are entries of automobiles SCUSA imported from Saab Auto between June of 1996 and July of 1997.<sup>2</sup> At the time of importation, SCUSA declared the transaction value of the automobiles to be the price it paid Saab Auto for defect-free automobiles.

<sup>&</sup>lt;sup>2</sup> SCUSA protested Customs's liquidation of the following entry numbers: 112-9896032-6\*, 112 - 9903676 - 1\*, 112 - 9850980 - 0\*, 112 - 9873165 - 1\*, 112 - 9876403 - 3\*, 112 - 9885094 - 9\*, 112 - 9876403 - 3\*, 112 - 9885094 - 9\*, 112 - 9876403 - 3\*, 112 - 9885094 - 9\*, 112 - 9876403 - 3\*, 112 - 9876400 - 3\*, 112 - 9876400 - 3\*, 112 - 9876400 - 3\*, 112 - 9876400 - 3\*, 112 - 9876400 - 3\*, 112 - 9876400 - 3\*, 112 - 9876400 - 3\*, 112 - 9876400 - 3\*,112-9958484-4, 112-9968124-4, 112-9983272-2, 112-9986698-5, 112-9006647-9. 112-9016015-7, 112-9943632-6, 112-9018813-3, 112-9030595-0, 112-9947519-1, 112-9950291-1, 112-9016015-7, 112-9018813-3, and 112-9936275-3. Those entries denoted with an asterisk (\*) represent entries over which SCUSA and Customs have agreed that the Court does not possess jurisdiction because they were not timely protested.

While the vehicles were still at the port of importation, SCUSA claims it identified defects in certain automobiles. Pl.'s Mot. Summ. J. at 13. These defects were repaired by SCUSA at the port. *Id.* at 13–14. The costs associated with these repairs are termed "port repair expenses" and are documented either through the AS–400 Warranty System or through invoices sent to SCUSA. *Id.* at 14. For each repair performed, the computer printout lists the protest number, the entry number, the VIN, the dealer, the claim number, the repair date, the object code, a brief description of the repair, <sup>3</sup> and the total paid for the repair. Pl.'s Ex. 15 (Confidential). The port repair expenses claimed by SCUSA total \$[ ].<sup>4</sup>

Prior to expiration of the Warranty period, but after the vehicles were shipped from the port, additional defects were discovered in the vehicles. Pl.'s Mot. Summ. J. at 14. To restore the vehicles to defect-free condition, the dealers repaired the vehicles. *Id.* The costs associated with these repairs represent SCUSA's "warranty expenses." *Id.* As with the port repair expenses, SCUSA has a computer printout that lists the protest number, the entry number, the VIN, the dealer, the claim number, the repair date, the object code, a brief description of the repair, and the total paid for each repair that constitutes a warranty expense. Pl.'s Ex. 16 (Confidential). The warranty expenses claimed by SCUSA total \$[ ].<sup>5</sup>

In addition to the computer printouts provided by SCUSA in Exhibits 15 and 16, SCUSA also included with its Motion for Summary Judgment five sample computer claim forms submitted by dealers to SCUSA using the AS–400 Warranty System.<sup>6</sup> Pl.'s Ex. 21 (Confidential). These computer claim forms are considerably more detailed than the printouts contained in Exhibits 15 and 16. The pertinent

 $<sup>^3</sup>$  E.g., "battery" or "sun visors" or "gear shift lever bearing assembly."

<sup>&</sup>lt;sup>6</sup>The parties referred to these computer claim forms as "backup repair orders" or "backup documentation" during the hearing. Oral Argument Tr. at 9, 52.

portions of the computer claim forms list the claim number; the VIN; the model; the "in service date"; the repair date; the mileage on the vehicle at the time of the repair; whether the repair was the result of a recall; a breakdown of the repair costs for parts and labor; and a more detailed description of the customer's complaint, the type of defect, and the repair(s) performed. Id. SCUSA failed to provide computer claim forms for every repair at issue "because of the prohibitive cost of producing all of the records." Pl.'s Reply at 19 n.10. Instead, SCUSA simply submitted computer printouts of all warranty and port repair expenses.

Customs liquidated the entries, appraising the vehicles at their transaction values. SCUSA protested the liquidations, requesting allowances under 19 C.F.R. § 158.12 for "damage [or] latent manufacturing defects." These protests were denied by Customs on August 9, 1999. On January 20, 2000, SCUSA filed a timely summons before the Court, and it filed its complaint on August 11, 2000. The parties subsequently filed motions for summary judgment, and the Court denied both parties' motions on July 14, 2003.

In its Opinion, the Court ruled that although SCUSA's protests were valid and jurisdiction was therefore proper under 28 U.S.C. § 1581(a), the Court nonetheless lacked jurisdiction over two groups of entries: those which Customs and SCUSA agreed were not protested in a timely manner,<sup>7</sup> and those encompassing automobiles whose defects had not been repaired before the protests were filed.<sup>8</sup> Next, after determining that 19 C.F.R. § 158.12 does apply to defects existing at the time of importation, regardless of whether or not those defects were discovered by the port director at the time of importation, the Court delved into the three requirements for an importer successfully to claim an allowance under section 158.12, as set forth in Samsung Electronics America, Inc. v. United States, 23 CIT 2, 35 F. Supp. 2d 942 (1999), aff'd, 195 F.3d 1367 (Fed. Cir. 1999). The Court found that SCUSA had easily satisfied the first requirement of showing that it contracted for "defect-free" merchandise. Saab Cars USA, Inc. v. United States, 27 CIT \_\_\_\_, Slip Op.

<sup>&</sup>lt;sup>7</sup>Customs and SCUSA agreed that entries 112–9805210–8, 112-9814363-4 112-9818038-8, 112-9822519-1, 112-9826593-2, 112-9896032-6, 112-9903676-1.  $112 - 9850980 - 0, \quad 112 - 9873165 - 1, \quad 112 - 9876403 - 3,$ 112-9885094-9, 112-9906444-1, 112-9915803-7. 112-9888725-5, 112-9891683-1, 112-9910140-9. 112-9801057-7, 112-9964040-6, 112-9964123-0, and 112-9940682-4 were not timely protested.

<sup>&</sup>lt;sup>8</sup>This category includes vehicles repaired after June 30, 1998 that were in the entries covered by protest 0502-98-100033, vehicles repaired after September 14, 1998 that were in the entries covered by protest 0502-98-100041, vehicles repaired after January 12, 1999 that were in the entries covered by protest 0502-99-100003, and vehicles repaired after March 26, 1999 that were in the entries covered by protest 0502-99-100008.

03–82 at 22 (July 14, 2003). With regard to the second and third requirements, the Court held that SCUSA had shown material issues of fact as to both, which needed to be resolved at trial. According to the Court, "[w]hat remains for trial is to develop the factual record to 'independently confirm the validity' of the repair records in order to establish that the defects did indeed exist at the time of importation." *Id.* at 23 (citation omitted). Likewise, "[t]rial is necessary to independently verify the amount of the allowances." *Id.* at 24.

In lieu of trial, the parties opted to submit an agreed stipulation of facts to the Court. On September 29, 2003, SCUSA submitted its Factual Stipulation in Lieu of Trial, along with affidavits from its expert witnesses, and Customs provided a declaration from its expert witness. The Court held a hearing on the matter on October 1, 2003. Because the Court previously concluded that SCUSA filed valid protests, jurisdiction is proper pursuant to 28 U.S.C. § 1581(a). See id. at 8–16 (analyzing the validity of SCUSA's protests).

#### II. STANDARD OF REVIEW

Customs's appraisal decisions ordinarily are entitled to a statutory presumption of correctness. 28 U.S.C. § 2639(a)(1). However, when a question of law is before the Court, the statutory presumption of correctness does not apply. Samsung, 23 CIT at 5, 35 F. Supp. 2d at 945–46 (citing Universal Elecs., Inc. v. United States, 112 F.3d 488, 492 (Fed. Cir. 1997)). Here, the only question before the Court is a question of law: What type of evidence is sufficient to satisfy Samsung's instruction that, to prevail on a section 158.12 claim, an importer must proffer "objective and verifiable evidence with some semblance of specificity"? Id. at 8, 35 F. Supp. 2d at 947. Since a question of law is at issue, the usual statutory presumption of correctness afforded Customs's appraisal decisions does not apply to this case.

#### III. DISCUSSION

19 C.F.R. § 158.12 allows an importer to claim an allowance in value for merchandise partially damaged at the time of importation. [A] protestant qualifies for an allowance in dutiable value where (1) imported goods are determined to be partially damaged at the time of importation, and (2) the allowance sought is commensurate to the diminution in the value of the merchandise caused by the

 $<sup>^9</sup>$ The relevant portion of § 158.12 reads:

<sup>(</sup>a) Allowance in value. Merchandise which is subject to ad valorem or compound duties and found by the port director to be partially damaged at the time of importation shall be appraised in its condition as imported, with an allowance made in the value to the extent of the damage.

<sup>19</sup> C.F.R. § 158.12 (2003).

defect." Id. at 6, 35 F. Supp. 2d at 946. "[T]o prevail on a section 158.12 claim, ... objective and verifiable evidence with some semblance of specificity must . . . be proffered. Indeed, to make a section 158.12 claim, a claimant should provide specific descriptions of the damage or defect alleged and . . . relate that defective merchandise to a particular entry." Id. at 8, 35 F. Supp. 2d at 947. The importer must prove that it is entitled to an allowance under section 158.12 by a preponderance of the evidence. Fabil Mfg. Co. v. United States, 237 F.3d 1335, 1339 (Fed. Cir. 2001).

SCUSA asserts that the computer printouts comprising Exhibits 15 and 16 are sufficient to satisfy Samsung's evidentiary requirement. Pl.'s Mot. Summ. J. at 23. Since the records list the VIN of each automobile that was repaired, SCUSA is able to relate each defective automobile to a particular entry. *Id.* In addition, the records contain a description of each repair that was performed, thereby satisfying Samsung's instruction that "a claimant should provide specific descriptions of the damage or defect alleged[.]" Pl.'s Reply at 18 (quoting Samsung, 23 CIT at 8, 35 F. Supp. 2d at 947). Moreover, SCUSA argues that since the terms of the Warranty permit reimbursement only for defective automobiles, all Warranty repairs (which were audited by Saab Auto and SCUSA) were necessarily limited to expenses for defects existing in the automobiles at the time of importation. Pl.'s Mot. Summ. J. at 25. Finally, the records also trace the cost of each repair, meaning that SCUSA is able to prove the proper allowance value for each entry of defective merchandise. Id. at 26-27.

Customs contends that the records comprising Exhibits 15 and 16 simply are not sufficient under Samsung's specificity requirement. Mem. Supp. Def.'s Cross-Mot. Summ. J. at 26, 29. This is because it is impossible to determine from the three- or four-word description of each defect found in the records whether it is a defect that existed at the time of importation. Mem. Reply Pl.'s Opp'n at 17 n.7. Instead, for every single repair expense, Customs asserts that SCUSA should have produced a more detailed computer claim form, like those found in Exhibit 21. Mem. Supp. Def.'s Cross-Mot. Summ. J. at 28. The information contained in the computer claim form, such as the mileage on the defective vehicle at the time of the repair, the repair date, and a more detailed description of the nature of the defect, would help Customs to make a more specific determination as to whether the defect existed at the time of importation, or was the result of some other circumstance. Id.

In response, SCUSA explains that it failed to submit a computer claim form for every repair at issue because of the "prohibitive cost" of doing so. Pl.'s Reply at 19 n.10 (citing Buchbinder Decl. ¶2). SCUSA further claims that *Samsung* does not require the "extraordinary level of specificity" found in the computer claim forms. Id. at 19.

# A. SCUSA Is Not Entitled to an Allowance for its Warranty Expenses

In *Samsung*, the Court set forth three requirements for an importer to claim an allowance under 19 C.F.R. § 158.12. First, the importer must show that it contracted for "defect-free" merchandise. *Samsung*, 23 CIT at 4, 35 F. Supp. 2d at 945. The Court has already ruled that "SCUSA has easily shown that it contracted for 'defect-free' merchandise." *Saab Cars USA, Inc. v. United States*, 27 CIT \_\_\_\_\_, Slip Op. 03–82 at 22 (July 14, 2003). Second, the importer must be able to link the defective merchandise to specific entries. *Samsung*, 23 CIT at 4–7, 35 F. Supp. 2d at 945–46. Third, the importer must prove the amount of the allowance value for each entry. *Id.* 

While the parties do not dispute that SCUSA can correlate each warranty expense with a VIN, which in turn can be linked to a particular entry, more is required of SCUSA. Mem. Supp. Def.'s Cross-Mot. Summ. J. at 26. "[O]bjective and verifiable evidence with some semblance of specificity must also be proffered. Indeed, to make a section 158.12 claim, a claimant should provide specific descriptions of the damage or defect alleged and, in some manner, relate that defective merchandise to a particular entry." *Samsung*, 23 CIT at 8, 35 F. Supp. 2d at 947. There is no doubt that SCUSA has "relate[d its] defective merchandise to . . . particular entr[ies]." *Id.* The problem, however, is that SCUSA has not described its defective merchandise with sufficient specificity.

SCUSA did nothing more than submit a computer printout of its warranty expenses. Pl.'s Ex. 16 (Confidential). This printout merely lists the name of each vehicle part or component that was allegedly defective; nothing in SCUSA's spreadsheet indicates how the component was defective, or what type of repair was performed. *Id.* Although SCUSA is able to retrieve considerably more detailed records (namely, the computer claim vforms), SCUSA did not offer such records into evidence because of the "prohibitive cost" of doing so. Pl.'s Reply at 19 n.10 (citing Buchbinder Decl. ¶2). However, the "prohibitive cost" of producing evidence is not a permissible justification for failing to produce evidence that is legally required to substantiate a party's claim.

The rationale underlying *Samsung's* instruction that a claimant must provide specific descriptions of the damage or defect alleged is simple:

Such descriptions are necessary because both the Court and Customs must independently confirm the validity of an allowance claim. And, descriptions . . . provide a reasonably objective basis upon which to assess such a claim. For example, descriptions can be reviewed by the Court and by independent experts

to confirm that the alleged damage existed at the time of importation. . . .

Samsung, 23 CIT at 8, 35 F. Supp. 2d at 947–48. The problem with the defect descriptions provided by SCUSA in its spreadsheet is that they are not detailed enough for anyone to ascertain whether the alleged defects existed at the time of importation.

For instance, the defect description provided by SCUSA for claim number 9241252, VIN V7008291, is merely "upholstry" [sic]. Pl.'s Ex. 16, Vol. 3, at 7 (Confidential). Although this is a small item, it is representative of the utter lack of specificity that plagues SCUSA's entire spreadsheet. Simply put, it is impossible for the Court, Customs, an independent expert, or anyone else to determine from the oneword description "upholstery" whether the upholstery really was defective at the time of importation. Without a more detailed description, the Court can only speculate when and how the upholstery was damaged.

On the other hand, if SCUSA would have produced a computer claim form for the damaged upholstery, both the Court and Customs would have been in a better position to assess SCUSA's allowance claim. Based on the computer claim form, Customs and the Court would have learned the precise nature of the repairs made to the upholstery, how long the vehicle with the damaged upholstery had been in use, and even whether there was a recall for defective upholstery. See Pl.'s Ex. 21 (Confidential) (providing sample computer claim forms). Because the computer claim forms contain precisely the type of specific information that would enable Customs and the Court to make an informed decision regarding whether the damage existed at the time of importation, SCUSA should have provided a computer claim form for every warranty expense. The fact that to do so would be costly does not relieve SCUSA of its legal obligation to prove its entitlement to an allowance by a preponderance of the evidence. Fabil, 237 F.3d at 1339.

In sum, the computer printout submitted by SCUSA in Exhibit 16 is insufficiently specific to comply with well-established law. Accordingly, the Court holds that SCUSA is not entitled to an allowance for its warranty expenses.  $^{10}$ 

<sup>&</sup>lt;sup>10</sup> Included with SCUSA's Factual Stipulation in Lieu of Trial is the Affidavit of Michael V. Schoenecker ("Schoenecker Affidavit"), one of SCUSA's expert witnesses, stating that he "examined sample warranty claims submitted by Saab," and opining that "these claims are consistent with repairs needed for manufacturing or design defects, as opposed to normal wear and tear damage." Schoenecker Aff. ¶16. The value of the Schoenecker Affidavit is questionable since Mr. Schoenecker did not review every allowance claim listed in Exhibit 16, but rather examined only "sample warranty claims." *Id.* However, even if Mr. Schoenecker had reviewed every single description of every single warranty expense at issue, that still would not have been enough, because the defect descriptions contained in Exhibit 16 simply do not satisfy *Samsung*'s specificity requirement.

There is one exception to the Court's holding, however. SCUSA produced ten computer claim forms in Exhibit A to its Reply to the Government's Opposition to Plaintiff's Motion for Summary Judgment and Response to the Government's Cross-Motion for Summary Judgment in an effort to substantiate ten different warranty expenses. Pl.'s Ex. A (Confidential); see also Pl.'s Reply at 19 n.10 (explaining why SCUSA provided the computer claim forms in Exhibit A). Customs objects to three of these ten allowance claims on the grounds that the vehicles at issue had high mileage and were in use for approximately two years. Mem. Reply Pl.'s Opp'n at 17–18.

The Court is unable to rule on one of Customs's objections because it concerns a vehicle in entry 9850980-0 (an entry over which the Court lacks jurisdiction). <sup>12</sup> See claim number 9147373, Pl.'s Ex. A (Confidential); Pl.'s Ex. 16, Vol. 1, at 109 (Confidential). With regard to the remaining two warranty expenses, the Court agrees with Customs that, due to the vehicle's relatively high mileage and the nature of the damage at issue, 13 SCUSA has not met its burden of establishing that it is entitled to an allowance for these two warranty expenses. See claim numbers 9865101 and 9865102, Pl.'s Ex. A (Confidential). In addition, the Court lacks jurisdiction over claim number 9402132 because it also concerns a vehicle in entry 9850980-0. See claim number 9402132, Pl.'s Ex. A (Confidential); Pl.'s Ex. 16, Vol. 1, at 109 (Confidential). Similarly, the Court lacks jurisdiction over claim numbers 9456071 and 9997792 because they involve vehicles in protest 0502-99-100003, and the vehicles were repaired after January 12, 1999. 14 See claim numbers 9456071 and 9997792, Pl.'s Ex. A (Confidential); Pl.'s Ex. 16, Vol. 3, at 27 (Confidential). Likewise, the Court lacks jurisdiction over claim number 9380531 because it involves a vehicle in protest 0502-98-100041, and the vehicle was repaired after September 14, 1998. 15 See claim number 9380531, Pl.'s Ex. A (Confidential); Pl.'s Ex. 16, Vol. 3, at 402 (Confidential). Thus, disallowing these seven warranty expenses, the Court finds that SCUSA is entitled to an allowance in the amount of

 $<sup>^{11}\</sup>mathrm{Two}$  additional computer claim forms included in Exhibit A describe port repair expenses for repairs made to [ ] vehicles. See claim numbers 7005551 and 7006361, Pl.'s Ex. A (Confidential). Because these two computer claim forms involve port repair expenses instead of warranty expenses, they are not relevant to the Court's present inquiry.

<sup>&</sup>lt;sup>12</sup> See supra notes 2, 7 and accompanying text.

 $<sup>^{13}</sup>$  I.e., a loose cupholder in a vehicle with 36,000 miles, and a loose ashtray in the same vehicle, which the dealer ultimately characterized as "broken."

<sup>&</sup>lt;sup>14</sup> See supra note 8 and accompanying text.

<sup>15</sup> See id.

l<sup>16</sup> for its warranty expenses documented with computer \$[ claim forms in Exhibit A.17

# B. SCUSA Is Entitled to an Allowance for its Port Repair Expenses

SCUSA's port repair expenses present a different situation entirely. The port repair expenses correspond to repairs that were performed at the port of importation. Pl.'s Mot. Summ. J. at 13-14. Given that these repairs were performed almost immediately after importation, the Court is not concerned, as it was with regard to SCUSA's warranty expenses, that the repairs might have been made to remedy damage resulting from intervening circumstances. Rather, with regard to the port repair expenses, the defects at issue almost certainly did exist at the time of importation since they were repaired at the port immediately after importation.

As a result, taking into account the unique nature of the repairs performed at the port, SCUSA has satisfied its burden of establishing that it is entitled to an allowance for its port repair expenses. First, as the Court previously ruled, SCUSA has shown that it contracted for "defect-free" merchandise. Saab Cars USA, Inc. v. United States, 27 CIT \_\_\_\_, Slip Op. 03-82 at 22 (July 14, 2003); Samsung, 23 CIT at 4, 35 F. Supp. 2d at 945.

Second, because SCUSA is able to correlate each port repair expense with a VIN, which in turn can be linked to a particular entry, SCUSA is able to relate its defective merchandise to specific entries. Pl.'s Ex. 15 (Confidential); Samsung, 23 CIT at 4-7, 35 F. Supp. 2d at 945–46. Customs objects that the defect descriptions provided by SCUSA for its port repair expenses in Exhibit 15 are just as deficient as those provided by SCUSA for its warranty expenses in Exhibit 16. Mem. Supp. Def.'s Cross-Mot. Summ. J. at 29. However, since the port repairs were undertaken at the port almost immediately after importation (unlike the warranty repairs, which occurred several months—or even years—after the vehicles were sold), SCUSA is not required to provide defect descriptions with the same degree of specificity as those required for its warranty expenses. In other words,

 $<sup>^{16}</sup>$ To reach this sum, the Court simply totaled the dollar figures appearing in the fields "Parts Claimed" and "Labor Claimed" for the three computer claim forms at issue. See Pl.'s Ex. A (Confidential).

<sup>&</sup>lt;sup>17</sup>As previously mentioned, SCUSA also provided five sample computer claim forms in Exhibit 21. Pl.'s Ex. 21 (Confidential). Although Customs concedes that, based on the information found in these five computer claim forms, SCUSA has met its burden of establishing its entitlement to an allowance for these five warranty claims, the Court does not have jurisdiction over these five claims. Mem. Supp. Def.'s Cross-Mot. Summ. J. at 28. All five of them relate to vehicles in entry 9814363-4 (an entry over which the Court lacks jurisdiction). See Pl.'s Ex. 21 (Confidential); Pl.'s Ex. 16, Vol. 1, at 1 (Confidential); supra notes 2, 7 and accompanying text. Accordingly, the Court is unable to grant an allowance to SCUSA for these five warranty expenses.

the same need does not arise for SCUSA to prove, by way of highly specific defect descriptions, that the defects existed at the time of importation. The Court is satisfied that, because the port repairs occurred both shortly after importation and at the port of importation, they were made to remedy defects in existence at the time of importation.

## IV. CONCLUSION

For the aforementioned reasons, the Court finds that SCUSA is entitled to an allowance in the amount of  $\S[$  ] for its warranty expenses and  $\S[$  ] for its port repair expenses. Judgment will be entered accordingly.

<sup>&</sup>lt;sup>18</sup> See supra notes 2, 7 and accompanying text.

 $<sup>^{19}\</sup>mbox{Also}$  subtracted from this total is the amount SCUSA paid for repairs to [ \$ ] vehicles since the [ \$ ] responsible for the damage occurred after importation. See supra note 4.